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No. 87-1270

In the Supreme Court of the United States

OCTOBER TERM, 1987

NAOMI RUTH WEST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred when it held that discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), bars petitioners' claim that the Federal Aviation Administration (FAA) negligently failed to conduct night test flights before approving a departure procedure for the airport near Bishop, California.

1. Petitioners filed suit to recover damages for the wrongful deaths of passengers on a Sierra Pacific charter flight that struck the side of a mountain while attempting to depart the airport on a moonless and extremely dark night. They alleged that inadequate ground lighting near the airport caused the pilot of the plane to misjudge the plane's distance from the mountains. Petitioners claim that the FAA was liable for the crash because the FAA had negligently failed to conduct night test flights prior to publishing an approved departure procedure for the Bishop Airport. Pet. App. 122a.[1]

[1] Because the mountains surrounding the airport were both high and close, the FAA departure procedure called for the pilot to fly a

The district court made findings and entered judgments for two groups of plaintiffs in April 1981 and October 1982 (Pet. App. 1a-72a). The government appealed, and the Ninth Circuit remanded the cases to the district court in 1984 for reconsideration in light of *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) (Pet. App. 88a-89a). On remand, the district court vacated its earlier judgments and entered judgment for the government, concluding that FAA officials who investigated safety conditions at Bishop Airport and subsequently prepared departure procedures for use there were acting "within the scope of the discretionary function exception" (*id.* at 107a).

2. The Ninth Circuit affirmed, holding that "[t]he design of the departure procedure was an exercise of discretion" and, thus, did not subject the government to a tort action under the FTCA (Pet. App. 136a). The court noted that the FAA had the power to establish necessary procedures and regulations for flight safety and had the power to delegate that discretion to its employees (*id.* at 128a). It further stated that FAA employees had in fact been delegated the power to determine what safety tests were necessary before approving departure procedures at Bishop Airport. The FAA employees were required only "to use their best judgment in deciding what tests were necessary to meet reasonable safety requirements" (*id.* at 135a) and make their decisions about departure procedures

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two-mile arc circling around the airport while climbing to 8,000 feet. It was essential to the FAA procedure that the pilot measure his distance from the airport visually, since reliance on instruments alone would not have provided sufficient margin for error. Pet. App. 120a.

Pilots departing from Bishop Airport were required to use either the FAA procedure or an alternative approved by the Federal Air Route Traffic Control Center. Sierra Pacific's own operations manual required its pilots to use the FAA procedure. Pet. App. 120a-121a.

accordingly. The court of appeals also found that, pursuant to FAA regulations, the pilot has the primary responsibility to determine whether conditions were safe enough to use the prescribed procedures (*id.* at 133a).[2]

3. The court of appeals' decision is correct. This case is indistinguishable in principle from *Varig Airlines* and was properly dismissed for that reason.

a. This Court stated in *Varig Airlines*, 467 U.S. at 814, that Congress' purpose in attaching the discretionary function exception to the FTCA was "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Petitioners contend (Pet 17-20) that *Varig Airlines* does not apply to the current case since the decisions at issue here were based solely on "safety" issues and not "social, political, or economic policies. What petitioners overlook is that *Varig Airlines* itself dealt with a "safety" issue.

The only difference between this case and *Varig Airlines* is that the FAA's safety standards in dispute relate to the flying of aircraft rather than to the design or manufacture of aircraft. In both cases, decisions as to how to promote safety in air travel involve a balancing of social, economic or political policies. This balancing includes practical considerations such as staffing and funding, which clearly require policy decisions covered by the discretionary function exception (Pet. App. 131a). See *Varig Airlines*, 467

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[2] In district court petitioners had also contended that the FAA was negligent in allowing Sierra Pacific to use Bishop Airport at night. At oral argument before the Ninth Circuit, attorneys for petitioners conceded that the FAA's certification of Sierra Pacific for night flights from Bishop Airport was within the discretionary function exception and stated that they were no longer claiming damages because of that action. Pet. App. 122a n.1. Petitioners have not sought to revive this claim in their petition.

U.S. at 820. Petitioners correctly point out (Pet. 20) that an operational error made by an air traffic controller is not protected by the discretionary function exception. *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), aff'd, 350 U.S. 907 (1955). But the "nature and quality" of that action—akin to a driver's turning left when he should have turned right—is fundamentally different from the decision of what safety tests were necessary before approving departure procedures. The ultimate operational burden in this case, and hence the ultimate responsibility for safety, was on Sierra Pacific Airlines, not the FAA. "When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Varig Airlines*, 467 U.S. at 819-820.

b. Petitioners contend that before *Varig Airlines* "courts appeared to have found workable guidelines for applying the discretionary function immunity" (Pet. 14) but that after that decision "[i]t is not an exaggeration to say that our jurisprudence is in a shambles in this area and badly in need of clarification" (*id.* at 15-16). They do not, however, identify any post-*Varig* conflict among lower courts regarding the question at issue; nor is any such conflict to be found. Petitioners' ultimate quarrel is clearly with this Court's unanimous and recent ruling in *Varig Airlines*. No further review of that claim is warranted.[3]

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[3] There are no allegations in this case that the FAA negligently failed to follow its own regulations in designing and approving a departure procedure for Bishop Airport. Thus, this case does not present any issue found in *Berkovitz* v. *United States*, cert. granted, No. 87-498 (Jan. 11, 1988), and there is no reason to hold this case for disposition in light of *Berkovitz*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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